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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-797

JESSE FRANK BOWERS and
BEN T. PHILLIPS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Now come the Petitioners, Jesse Frank Bowers and Ben T. Phillips, by their attorneys, Benjamin S. Adamowski, Paul D. Newey, Robert E. Adamowski and Francis X. Riley, who pray that this Court issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review a final order of that Court, and allege as follows:

OPINION.

The opinion, affirming a conviction for conspiracy to, and the substantive offense, of dealing in stolen automobiles, which by court direction, lies more nearly *in camera* than *in pectore,* will not be published. The concluding paragraph . . .

> "directs the clerk to file this memorandum, supply copies to counsel, and to enter judgment affirming the judgments appealed from. The court considers this judgment to lack substantial significance as precedent, and therefore directs the clerk not to have the memorandum printed, circulated, nor sent to the reporter system." (*infra,* p. 7a)

The text of the nine (9) page opinion appears in full in Appendix A.

JURISDICTION.

1. The final order was issued on September 21, 1972. Rehearing was denied on November 3, 1972 (Appendix B).

2. Jurisdiction of this Court is invoked to review that judgment pursuant to §1254(1) of the Judicial Code. (28 USCA)

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QUESTION PRESENTED FOR REVIEW.

Were the defendants, who are black businessmen, doing business in a predominantly black, urban community among black customers, denied due process when tried for a crime arising out of that business, by a government-maneuvered all-white, southern oriented, rural jury, which was incapable of trying them fairly because they lacked the leaven from a large and identifiable segment of the community?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional Provisions involved in this case are the due process clause of the Fifth and the first clause of the Sixth Amendments to the Constitution of the United States of America which provide:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Amend. 5)
>
> * * * * *
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and . . . (Amend. 6)

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STATEMENT OF THE CASE.

The federal judicial area for the Eastern District of Illinois, not only compromises the counties on the Eastern border of Illinois from Kankakee on the north to the Ohio River on the south, but it includes every southern county of Illinois north to a line at Alton. (28 USCA 93(c)) The City of East St. Louis is so predominantly black that on April 6 of this year, it elected a black mayor. This petition involves that district and this portion of it. (*infra*, p. 1a)

The defendant, Ben Phillips, took the stand and said he had lived in East St. Louis all his life. In 1962, he opened an insurance agency, which he continues to operate. (T. 394)[1] In 1966 he opened a used car business with Jesse Bowers, who had from 1960 to 1964, worked for the federal government, and at the time of trial was employed by St. Louis University. (T. 397) Phillips also catalogued his involvement in the business, cultural and political life of his community. He said he was a trustee of the Massadonia Baptist Church, and a member of its choir. He belonged to the East St. Louis Chamber of Commerce; Metro-East Investment Corporation, the East St. Louis Independent Insurance Association; Vice-Chairman of the Congress of Negro Businessmen, and, a member of the School Board for East St. Louis District 189. (T. 396)

When the government struck all the black people from the panel to try these defendants, the latter objected on the

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[1] The "T" references are to the Transcript of the Trial.

ground the blacks were removed solely because they were black. (T. 47-48) It was the resultant all white jury which returned the verdict finding them guilty on evidence they misapprehended, as strangers to the urban community customs they were judging.

That evidence was:

A. The Three Automobiles.

1. Defendants' friend (T. 416) and accountant (T. 105) Johnnie Scott bought a Cadillac from the defendants, in June or July, 1967. (T. 98) It was financed through the local bank, and Phillips put through all the papers. (T. 105-107) In October, 1967, the car had been stolen from Scott in Chicago, and some two weeks later the Chicago Police recovered it and returned it to him. (T. 111) In November, 1969, he got the title from the bank. (T. 107)

In late 1969, Scott wanted to trade this Cadillac for another. He went to Lindburg Cadillac in St. Louis but "couldn't agree on price," (T. 103) so he went to Elder Cadillac in East St. Louis, where the "transaction was handled at Elder Cadillac just as it was at Economy." (T. 108)

However, Elder Cadillac had checked a secret title number on the car, and at that time, two and a half years later, everyone discovered that this car had been stolen from Lindburg Cadillac in St. Louis in 1967. (T. 103, 92)

2. In May or June, 1967, James Malone, a local citizen, had seen a red and white Buick Wildcat displayed on defendants' used car lot for about two weeks. (T. 227) He bought it for cash, applied for and got his own license plates. (T. 228)

Two and one half years later, he was stopped in Detroit, where he lived, for a missing license plate. (T. 231) The traffic policeman noticed "the serial number was missing from inside the door." (T. 232) The policeman had an expert "from the auto squad come out and find this other hidden number." (*id*).

The car had been stolen on April 7, 1967 in Indianapolis, Indiana. (T. 221)

3. Johnnie F. Woodhouse had lived in East St. Louis for about thirty (30) years, (T. 282) in the immediate vicinity of the lot and Phillips' insurance office. (T. 310-11) He saw a Cadillac on the defendants' used car lot, and bought it in September, 1968, financing it through the local bank. (T. 290-92) One year later he learned that the car had been stolen. (T. 288)

It had been stolen on August 29, 1968 from a used car lot in Indianapolis, Indiana. (T. 231-32)

B. The Mississippi Titles.

These three automobiles came into the defendants' possession on purchases, each with a "Mississippi Road and Bridge Privilege Tax Receipt." (Pl. Exs. 3, 4 and 7) The deputy sheriff of Marshall County, Mississippi, (T. 118) said, about this receipt: "Anybody else looking at it in any other state would recognize it as a legal document issued by the State of Mississippi to a car owner." (T. 124) No identification is needed at the time of issue. (T. 125)

The auto file supervisor for the Illinois Secretary of State said that this receipt with an affidavit of sale was sufficient for the State of Illinois to issue its Certificate of Title. He said, of these, "there was nothing unusual about

issuing a title on the basis of the government's exhibits. It would 'suffice' all legalities in his office, nor would a dealer, title company or title officer go behind these documents." (T. 159)

Phillips testified that:

A. I took this Road and Bridge Registration from the State of Mississippi, along with the affidavits from Mrs. Elaine Neal, and used this or surrender it to the State of Illinois for an Illinois title.

Q. Now did you try to get any opinions on this, or had you done this before? Was this in the normal course of your business?

A. Well, it was in the normal course of my business, because I am also a licensed remitter, a license remitter.

Q. What do you mean by that? (T. 410)

A. A license remitter, this is the method by which people who live outside the City of Springfield or Chicago apply for license plates at a designated time; and the State on many occasions had advised me how to transfer a Mississippi Road and Bridge Title or other registrations where there is no place to reassign it on the back. The instructions have been in this kind of business and in an area like this you have many individuals coming here from Mississippi with automobile title and transfers and what have you. (T. 411)

C. The Secret Numbers.

All three of these belated discoveries of theft, were established by police specialists trained in the location of the factory, hidden number of the cars. (T. 178, 272, 216) This number previously had been altered on the Road and

Bridge Receipt when delivered to defendants. (T. 219, 274, 362)

Sergeant Robert Thompson of the East St. Louis Police Department, said: "It is a generally hidden, secret number." "Dealers could learn it, but ordinarily would not know where it was." (T. 186-87) Detective Sergeant Daniel Diefenback, a Detroit auto specialist, said: "The confidential number is the number that is affixed, usually, to the frame of the automobile, prior to the body being installed on it." (T. 273) Corporal Frederick Wheeler of the Illinois State Police said, "manufacturers place the serial number in special places, and inform him and other officers like him where it is." (T. 366)

There is no evidence of record that either Phillips or Bowers could or did know the whereabouts or the existence of this secret number.

D. These Secret Numbers.

The secret (the manufacturer's stamped) number on the Scott car ended with "579". The original Road and Bridge Tax receipt given to Phillips ended with "889". (T. 129; see Gov. Ex. 3) On the Malone car, the Tax receipt showed the secret number ending in "4", and some documents carrying it as "7". (T. 274, 261) The Woodhouse car had the final numbers changed from the true, secret "376" to "878". (T. 362-63; See, Gov. Ex. 4)

E. Market Value.

All of these cars were sold at true (market) value. (T. 414, 228-29, 429) Malone had his credit union appraise his car prior to purchase. (T. 229) Both Scott and Woodhouse were compensated fully by Phillips. (T. 416, 429)

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F. Financing.

The element of the trial, which the appellate court embraced for affirming the judgment, (*infra*, pp. 2a-4a) was financing, or the "paper work", as inferentially incriminating. At the outset, this eliminates the Malone car. Phillips never even knew the sale occurred, until he read it in the indictment served upon him. (T. 422) The Malone car was seen by him displayed on the lot for two weeks, he financed through his company union and applied for his own plates. (T. 227-29)

The Scott financing transaction was informally done, by the signing of blank forms, the completion and submission of them done by defendants. (T. 99-100; 404-05)

Woodhouse never saw Phillips when he bought his car, (T. 290) although the latter handled the financing of it through the local bank. (T. 422-23)

In June, 1969, Elaine Neal came to Ben Phillips' insurance office, and said she had taken her car to the used car lot. (T. 401) This was the car Scott bought. (T. 403) Mrs. Neal did not have her "title" with her. (T. 406) On June 20, 1967 Phillips gave the five hundred dollars ($500.00) (T. 408) "This is normal, a normal transaction anytime you have a car on consignment from another person." (T. 409) On July 13, 1967, she delivered the title to the car and received the balance of her money. (T. 414) She also signed the necessary affidavit. (*id.* Gov. Ex. 8) These were submitted to the State of Illinois, which issued its title and delivered it to the lending bank.

Phillips never saw Elsie Neal although he notarized her signature on the documents given him. (T. 419) She got $1950 for her car, (*id*) and, as Phillips said, "it was not

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unusual for me . . . to notarize titles and what have you that have gone over the desk at the car lot." (T. 420)

A year and a half after these transactions, the Woodhouse finance arrangement, which followed was normal, (T. 422-23) but the lapse of time between the delivery of the car and the delivery of the title and the insertion of the Woodhouse name on the Mississippi tax receipt, were unusual. (T. 424) Bowers gave Sam Williams a five hundred dollar ($500.00) deposit when he left the car at the lot, (T. 423) and the latter signed a receipt for it on September 25, 1968. (T. 424)

On February 18 or 19, 1969, Sam Williams came to Phillips with the tax receipt. (*id.*) The bank loan money for the balance was then being held by Phillips in his office. (T. 425) When Phillips saw the Mississippi tax receipt in Woodhouse's name, he demanded an explanation. Williams told him that Bowers had said the car was sold to Woodhouse and for Williams to put it in his name. Phillips made no further inquiry since the Illinois Secretary of State had told him "this tax receipt or title was as valid as any title in the United States." (T. 426)

In the meantime, a title application, showing the bank's lien was issued on September 23, 1968, and after the delivery of the Williams' Mississippi tax receipt, a corrected title application was submitted, and a title issued. (T. 426-27) Woodhouse did not sign the application for the corrected title, and knew nothing of it, because he still owed money at the bank, and would not get the title until the loan was paid. (T. 291)

The jury found defendants guilty on all counts. (T. 28, 29) They appealed relying upon the failure of the evidence

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to prove guilty knowledge; the denial of due process in a trial to an all-white, prejudiced jury; and, prejudicial trial error, in using "no found" returns of subpoenas of a Mississippi sheriff, to prove the non-existence of the two persons named.

The Court of Appeals affirmed, using a white, middle class norm for commercial transactions, to reject the defendants' proof of their innocence. (*infra*, pp. 4a-5a) A petition for rehearing was filed calling to the court's attention that between the date of oral argument (December 2, 1971) and the decision affirming, (September 21, 1972) this court had issued an opinion in *Peters* v. *Kiff*, then reported in 33 L. Ed. 2d 83, holding: (a) that a fair trial is an objective standard; (b) the make-up of the jury is an indispensable element of fairness; and (c) that if a race, especially when a large and identifiable segment of the community, is deliberately excluded from serving in a given trial, the jury is deprived of a perspective which may have an unsuspected importance. Consequently, the trial is unfair.

The Court denied rehearing in one word.

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ARGUMENT.

The petition for a writ of certiorari should be granted in this case, because:

1. The government by conscious effort obtained an all-white, southern oriented, rural jury to try two black businessmen, conducting business in a predominantly black urban milieu, among black customers, and convicting them on circumstantial evidence, inferentially applicable to a white, middle class *mores*.

2. Due Process postulates objective fairness. If the government, as prosecutor, may deliberately exclude black people from the jury in this case, objective fairness is precluded, by: (a) the apothesis of the process of jury selection at the price of an impartial jury; and, (b) selecting a jury incapable of rendering an impartial verdict, since it lacked the leaven of human experience, which could give it the perspective of the customs, trade practices and *mores* of these defendants in their own community.

Johnny Scott was the government's first witness, (T. 94) who bought a car from his friends, these defendants, at market value. When the time came to trade it in, he took it to a local automobile dealer, who handled the second transaction in the same manner as did defendants. (T. 108, 110) Since the appellate court affirmed upon the issue of the unusual handling of these sales, it is obvious it must have had an equal impact on the jury. A local black on the jury could have had an enlightening influence on those white jurors, who were light years removed from automobile market practice in the City of East St. Louis.

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Thus, this jury was the epitome of unfairness, for the type of case in issue; the handicap of the times and the place; and, the limits of its own experience. That the government maneuvered it, is blatantly of record.

Mr. Younge: May we at this time move for a mistrial on the basis that we have here a systematic exclusion of Negroes from the jury, in that the three struck, all three struck by the Government, as made here, have been Negroes. The only Negroes on the panel of jurors is only four. We made an original exception as to the few Negroes on the panel. We now find this is a continuation of an effort to see, to systematically exclude Negroes from the jury; and none of these persons have given any specific answers that would disqualify them or point them out as being prejudiced or haven't leaned in that direction. If they are disqualifying them only because of race, we feel this is a systematic exclusion. (T. 47)

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And I think most strictly it is asserted that when there is an act where racial consideration is to be given, the inference is that if the black jurors cannot be fair; but that the white jurors should not be fair; and it is contrary to the spirit of the law; that it goes into a matter that is more than constitutional; but it is now prohibited; and there is systematic exclusion of black jurors. (T. 48)

Mr. Neville: May I add one point and point out to the Court that specifically one of the three jurors—and again there were only three challenges exercised by the Government, and they were all Negroes—one of the three jurors, based upon the voir dire questions,

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should be a juror that the Government would want, because of her background. Her brother was chief of police. Everything she answered indicated an extremely fair type of juror that the prosecution would want. Yet, they discharged her. (T. 48)

In making their charge of prejudice, the defendants expressly eschewed the constitutional make-up of the venire. They relied on the subjective *fact* of prejudice, which denied them a fair trial. The appellate court ignored the fact and that argument, and chose to replace it with the irrelevance of preemptory challenges, and the unwarranted "presumption" of prosecutorial impartiality, citing *Swain.* (*infra,* p. 5a)

Here, the defendants repeat the fact that this jury in this trial was subjectively unfair. This doctrine of *ad hoc* unfairness has judicial sanction, and this Court specifically has related *ad hoc,* subjective testing for fairness to the application of Rule 14 FR Cr. P (18 USCA), in pleas for severance of joint defendants, *Schaeffer* v. *United States,* 362 U.S. 511, 516, and calling for its application "at all stages of the trial . . . if prejudice does appear." If a fair trial is a continuing concern at all stages for one purpose, it is a concern for this purpose where the government blatantly euchres an all-white, rural, southern oriented jury from an area in racial tension to try two black urban based businessmen. (*Peters* v. *Kiff,* 33 L. Ed. 2d 83, [June 22, 1972])

That case had a long judicial history, (*id.* 89, fn. 1) but the headnote furnishes an accurate and succinct statement of the issue. It reads: (*op. cit.*)

"A state prisoner, whose burglary conviction was affirmed by the Georgia Court of Appeals (115 Ga.

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App. 743), instituted habeas corpus proceedings in the United States District Court for the Middle District of Georgia, alleging for the first time that Negroes had been systematically excluded from the grand jury that had indicted him and from the petit jury that had convicted him. The District Court denied the petition, and the United States Court of Appeals for the Fifth Circuit affirmed on the ground that because the prisoner was not himself a Negro, he had not suffered any unconstitutional discrimination and thus his conviction must stand (441 F. 2d 370)."

In the course of its opinions there, this court repeated its demands for a fair trial vis-a-vis due process.

"A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison,* 349 U.S. 133, 136, 99 L. Ed. 942, 946, 75 S. Ct. 623 (1955). The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding."

• • • • •

Again,

"Long before this Court held that the Constitution imposes the requirement of a jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."

• • • • •

And,

"Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." (33 L. Ed. 2d at 93)

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In approaching the question raised here, this Court admonished what a black person or persons on this jury could or would have done, in the light of the appellate court's language relative to white, middle class commercial customs. (*infra*, pp. 4a-5a)

An initial payment upon receipt of the car, and the payment of the balance upon receipt of the title papers; plus, the purchase and operation of a car pending the completion of the "paperwork", would not be given a criminal context, if the leaven of some black people of this urban community were permitted to sit in deliberation on the criminal implications of such practices.

> "Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (33 L. Ed. 2d 94)

Surely, a "perspective" of "unsuspected importance" would be available in the concept of a fair trial here, if black people (person) had been allowed to deliberate with these whites, in reaching their verdict. Local customs in the sale and purchase of used cars, as a fact of daily experience, would have entered into considerations of whether the hiatus between purchase money, possession, and paper work imputed criminal knowledge. (T. 106, 107; 169)

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The *Peters* dissenting opinion is not to the contrary. It simply disagreed with the procedural history, (*id.* at 96) and a reversal of the conviction, when petitioner had failed to establish (he didn't even allege) the denial of the federally secured right to a fair trial. (at 97)

These defendants renew their plea that this jury could not try them fairly. Due process required the District Court to have increased the number of blacks in the venire, (T. 47) or to have called for the selection of another panel. In any event, *Peters* refutes the appellate court's reliance upon *Swain,* and calls for application of Fifth Amendment demands that "a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136.

CONCLUSION.

Wherefore, these petitioners pray that this Court issue its Writ of *Certiorari* to the Court below, to reverse the judgment of conviction and sentence, and to grant defendants a new trial before an impartial jury.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1972 September Session, 1972

Nos. 18943, 4

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

JESSE FRANK BOWERS and
BEN T. PHILLIPS,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois, Crim. No. 70-13.

Honorable William G. Juergens, Judge.

September 21, 1972

Memorandum opinion, unreported.

Before Fairchild, Pell and Sprecher, *Circuit Judges.*

Per Curiam. Defendants Bowers and Phillips operated a used car lot in East St. Louis, Illinois, doing business as Economy Auto Sales. They were convicted of three counts of receiving, concealing, and selling a stolen automobile, moving as interstate commerce, knowing the same to have been stolen,[1] and of conspiring to commit each of these offenses.

[1] 18 U.S.C. §2313.

(Opinion of the U. S. Court of Appeals)

1. *Sufficiency of the Evidence.*

Three automobiles were involved. There is no dispute that these cars were stolen in another state, appeared on defendants' lot, and were sold to customers who apparently purchased in good faith. In each case an Illinois certificate of title was later obtained for the purchaser by presenting a road and bridge tax receipt issued by a Mississippi sheriff. At the time of these transactions, Mississippi did not issue a certificate of title. An apparent owner who desired to license an automobile in a particular county in a particular year paid a tax to the sheriff, and the sheriff issued a license tag and a receipt which other states ordinarily accepted as evidence of title of the vehicle described.

The critical issue is whether defendants dealt with these automobiles innocently or with knowledge that they had been stolen. The evidence is circumstantial.

Count V involved a 1966 Buick with its true serial number ending in 984. It was stolen in Indianapolis April 7, 1967 and sold from defendants' lot to James T. Malone June 16, 1967. On July 7 Malone's application for an Illinois title was sent in, showing a serial number ending in 987, and accompanied by a 1967 tax receipt bearing the same number, issued by the sheriff at Holly Springs, Mississippi in the name of Elsie Neal, Slayden, Mississippi, June 28, 1967. The receipt indicated that the car had previously been registered in Michigan. The Malone Illinois application showed that the car had been purchased from Neal, but it appears this information was filled in after Malone signed.

(Opinion of the U. S. Court of Appeals)

Defendant Phillips testified in substance that defendants had taken the car on consignment from Elsie Neal, and that she brought the Mississippi tax receipt to defendants July 7, at which time they paid her $1895. Although he testified that it was common for the seller of a used car to bring in the title after turning over the car, he offered no explanation why, if defendants believed they were dealing with a true owner by the name of Elsie Neal, they would accept a receipt she obtained after the sale. The government attempted to subpoena Elsie Neal, but the marshal for that district returned the subpoena "not found".

Count I involved a 1967 Cadillac with a true serial number ending in 878. It was stolen in St. Louis June 9, 1967 and sold from defendants' lot to Johnny Scott June 20, 1967. On July 13, Scott's application for an Illinois title was sent in, showing a serial number ending in 889, and accompanied by a 1967 tax receipt bearing the same number, issued by the same sheriff in the name of Elaine Neal, Slayden, Mississippi, June 28, 1967. The receipt number indicates this tax payment immediately preceded the Elsie Neal payment, and the receipt indicated, as in the other case, that the car had previously been registered in Michigan. The Scott application showed that the car had been purchased from Neal.

Defendant Phillips again testified that this was a consignment transaction; that defendants paid Elaine Neal $500 June 20 and $5,000 July 13, and that Elaine Neal brought the tax receipt to defendants July 13. Again there was no explanation why the Mississippi tax receipt would have been obtained after the car was sold, and again, there was a "not found" return as to Elaine Neal.

(Opinion of the U. S. Court of Appeals)

Count III involved a 1967 Cadillac with a true serial number ending in 376. It was stolen in Indianapolis August 29, 1968 and sold from defendants' lot to Johnnie Woodhouse September 21, 1968. On April 21, 1969, an application, with Woodhouse's purported signature, was made for an Illinois title, showing a serial number ending in 878, and accompanied by a 1969 tax receipt bearing the same number, issued by the sheriff at Ackerman, Mississippi, February 17, 1969. The application failed to show the lien of the financing bank and an application for correction was made May 16, 1969, again with Woodhouse's purported signature. Woodhouse and his wife testified these signatures were not his. The applications were notarized by Phillips. The tax receipt was issued in Woodhouse's name at an address in Ackerman, where he never lived, and indicated he had acquired the car the previous day from Sam W. Williams. The Illinois title application showed Williams' address in Jackson, Mississippi, but there was testimony that the address does not exist and no Sam W. Williams could be found in Jackson.

Defendant Phillips again testified that this was a consignment transaction, that defendants paid Williams $500 September 25, 1968 and $3700 February 19, 1969 when he brought in the tax receipt. There was no plausible explanation for the timing and other peculiarities of the receipt transaction.

None of the purchasers was aware that he was purchasing his car from an individual owner as alleged by defendants. In each case the purchase was financed, the Illinois title was turned over to the lender rather than the purchaser, and the application was handled by Phillips.

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Defendants rely on *Rodgers* v. *United States*, 402 F. 2d 830 (9th Cir., 1968). There, however, the government's evidence consisted of defendant's possession of a car recently stolen in another state and an apparently valid title, without any showing of a fraudulent source. It was held that such evidence alone did not justify an inference of interstate transportation by the defendant, with guilty knowledge. The facts are sufficiently different here. The jury could rely on common sense in determining that the activities attributed to the two Neals and to Williams, were not an adequate explanation, consistent with defendants' innocence, of how they came to possess and deal with the three stolen cars. The jury was not bound to accept Phillips' testimony as true.

2. *Government's peremptory challenges of Negroes.*

Defendants, both black, contend that they were denied a fair trial because, although there is no claim of systematic exclusion of black people from the jury list, the government peremptorily challenged the only black people who were called, and thus caused the selection of an all white jury.

The decision of the Supreme Court in *Swain* v. *Alabama*, 380 U.S. 202 (1965) forecloses defendants' claim. The Court said: "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain

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> a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand, all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think would establish a rule wholly at odds with the peremptory challenge system as we know it." (p. 222)

Although *Swain* involved the fourteenth amendment equal protection clause, we are of the opinion that its reasoning applies with equal force under the fifth amendment due process clause.[2]

3. *Introduction of "not found" return.*

The circumstances inevitably raise questions concerning the true identity and connection with the thefts of the persons who obtained the Mississippi tax receipts and purported to be Elaine and Elsie Neal and Sam W. Williams. There was testimony that the address given for Williams on the Illinois title application was false, and in each instance it appeared that some item on the original Mississippi receipt had been changed after the original was no longer associated with the copy kept by the sheriff and the copies he forwarded to a state office.

The government offered the subpoenas directed to the two Neals and the marshal's returns stating he had endeavored to serve them but after diligent search and inquiry they could not be found in the district. The court overruled

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[2] See *United States* v. *Pearson*, 448 F. 2d 1207, 1214, n. 15 (5th Cir., 1971).

objections, suggesting that the returns tended to show unavailability of the Neals as the reason they were not witnesses. Defendants concede that the subpoenas and returns were competent for the purpose admitted, but argue that their proper probative value was outweighed by the prejudicial effect of suggesting the two Neals did not exist at the time of the transactions. We agree that under the circumstances it is intellectually difficult to separate their unavailability at the time of trial from the questions which naturally arise concerning their existence or identity at any time. But all the circumstances make it so plain that they were not two innocent "little old ladies" from the tiny hamlet of Slayden who had come into possession of a Buick stolen 2 months before and a new Cadillac stolen nine days before, that we cannot attach any significance to defendants' point.

This court directs the clerk to file this memorandum, supply copies to counsel, and to enter judgment affirming the judgments appealed from. The court considers this judgment to lack substantial significance as precedent, and therefore directs the clerk not to have the memorandum printed, circulated, nor sent to the reporter system.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

November 3, 1972.

Before

Hon. Thomas E. Fairchild, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

Nos. 18943, 18944

United States Of America,
Plaintiff-Appellee,

vs.

Jesse Frank Bowers, and
Ben T. Phillips,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois (Crim 70-13)

On consideration of the petitions for rehearing filed in the above-entitled causes,

It Is Ordered that said petitions be and the same are hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-797

JESSE FRANK BOWERS AND BEN T. PHILLIPS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioners were found guilty on three counts of having knowingly received and sold stolen automobiles, which had travelled in interstate commerce, and on three counts of having conspired to commit the substantive offenses, in violation of 18 U.S.C. 2313 and 371. They were sentenced to three years' imprisonment on each count, to run concurrently. The court of appeals affirmed (Pet. App. A).

1. It is undisputed that petitioners, who owned the Economy Auto Sales in East St. Louis, Illinois, sold to good-faith purchasers three stolen automobiles, the

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serial numbers of which had been altered prior to the sales (Tr. 92, 221, 233). As the opinion below sets forth in detail (Pet. App. 2a–5a), petitioners prepared the necessary forms and affidavits for Illinois Certificates of Title, which were obtained upon presentation of Mississippi "Road and Bridge Tax Receipts" to the Illinois Secretary of State. At the time of the transactions involved here, Mississippi, a non-title State, issued a license tag and a receipt upon payment of a yearly tax to a Mississippi sheriff by any party claiming ownership of a given car. Other States ordinarily accepted the Mississippi tax receipt as indicative of ownership (Tr. 124–125, 131, 140–141, 156, 159). In the instant case, unknown to the purchasers, petitioners listed Mississippi residents, and not Economy Auto Sales, as the sellers (Tr. 97–100, 230, 236, 287–288).[1] In one of the sales, the Illinois purchaser was also listed as a Mississippi resident and his name was forged to the Illinois title application (Tr. 287).

After describing the three sales, the court below concluded (Pet. App. 5a): "The jury could rely on common sense in determining that the activities attributed to the [alleged and missing Mississippi sell-

[1] Two of these alleged sellers, Elsie Neal and Elaine Neal, were listed on the Mississippi "Road and Bridge Tax Receipts" as residing in the town of Slayden, Mississippi (Tr. 121, 249). Subpoenas for their presence at trial were returned by the United States Marshal marked "could not be found" (Tr. 280). The third alleged seller, Sam W. Williams, was listed on the tax receipt as residing at a specified address in Jackson, Mississippi. At trial it was established that the address was fictitious and that no Sam W. Williams could be found in Jackson (Tr. 371–372).

ers], were not an adequate explanation, consistent with defendants' innocence, of how they came to possess and deal with the three stolen cars."

2. Petitioners allege that they were denied due process and a fair trial by the government's exercise of peremptory challenges resulting in an all white jury (Pet. 12) and by the court's failure to select another jury panel or increase the number of blacks in the venire (Pet. 17). (There is no challenge to the fairness of the jury selection plan for the district.)

a. *The jury panel.* The Eastern District of Illinois encompasses forty-five counties, of which eleven are located in the East St. Louis area, where the events in question occurred and from which the jurors were selected. According to the 1970 census there are 494,031 whites and 74,007 blacks in the eleven-county East St. Louis area, approximately 87 percent and 13 percent, respectively, of the total population. St. Clair County, in which the court sat[2] and in which East St. Louis is located, is approximately 75 percent white, whereas East St. Louis itself is approximately 70 percent black (1970 United States Census Reports, Series PC–1(B), pp. 233–305.)

The jury panel in the instant case numbered thirty-two prospective jurors, of whom twenty six (81 percent) were white and six (19 percent) were black. Three jurors, one of whom was black,[3] were excused

[2] The court also sits in Benton, Cairo, and Danville, Illinois.

[3] This juror, a medical technician, was excused by the court upon presentation of a letter from her hospital supervisor that her services at the hospital were essential and no substitute technician was available.

at their request by the court prior to the jury *voir dire*.[4] Of the twenty-nine jurors called, twenty-four (83 percent) were white and five (17 percent) were black.

b. ***The trial jury.*** The defense peremptorily challenged ten prospective jurors, all of whom were white (Tr. 50, 58, 62, 70, 74). The prosecutor challenged five prospective jurors, four of whom were black (Tr. 47, 57, 80). The court excused two jurors, one of whom was black, for cause (Tr. 52, 65). All twelve jurors selected were white, four resided in St. Clair County and one, the jury foreman, resided in East St. Louis.

3. Petitioners, who are black, base their claim of discriminatory jury selection on the due process clause of the Fifth Amendment and the "impartial jury" clause of the Sixth Amendment. As the court below noted (Pet. App. 5a), however, *Swain* v. *Alabama*, 380 U.S. 202, held that the peremptory striking of blacks from a jury panel in a particular case does not itself demonstrate or suggest a denial of equal protection of the laws (380 U.S. at 221). That decision applies with equal force to claims under the Fifth Amendment due process clause. See *United States* v. *Pearson*, 448 F. 2d 1207, 1214, n. 15 (C.A. 5). To establish the denial of a fair and impartial jury, petitioners had to demonstrate either a pattern of racial discrimination by the prosecutor through the exercise of peremptory challenges over a period of time (see, *e.g.*, *Swain* v. *Alabama*, *supra*, 380 U.S. at 222–224; *Hollins* v. *Oklahoma*, 295 U.S. 394), or racial discrimination in the local plan for selecting grand jury or petit

[4] The trial transcript, including the transcript of the *voir dire* selection of jurors, has been lodged with the Clerk of this Court.

jury panels (see, *e.g.*, *Sims* v. *Georgia*, 389 U.S. 404; *Avery* v. *Georgia*, 345 U.S. 559). Here, there has been no such discrimination shown or alleged, and petitioners therefore have not been denied due process or their right to a fair trial. See *Swain* v. *Alabama*, *supra*, 380 U.S. at 221–222; *United States* v. *Carlton*, 456 F. 2d 207 (C.A. 5); *Lattimore* v. *Craven*, 453 F. 2d 1249, 1251 (C.A. 9); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1214 (C.A. 5); *United States* v. *Williams*, 446 F. 2d 486 (C.A. 5); *Brown* v. *Crouse*, 425 F. 2d 305 (C.A. 10). Hence, petitioners' reliance (Pet. 11, 14–16) on *Peters* v. *Kiff*, 407 U.S. 493, is misplaced. In *Peters* the petitioner challenged the *system* used to select the grand jury that indicted him and the petit jury that convicted him.

Moreover, petitioners' argument (Pet. 12) that a local black on the jury could have enlightened the jurors on the automobile market practice in East St. Louis amounts to pure speculation. And in any event, such a practice is a matter that petitioners could have sought to prove at trial if it were deemed important to their defense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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